124-67

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 1387.

CHARLES H. PAGE

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

ALLAN RUTHERFORD,
Attorney for Claimant.

W. H. MOORE, PRINT., 511 11th ST. N. W.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

CHARLES H. PAGE
vs.
THE UNITED STATES. } No. 1387.

BRIEF FOR APPELLANT.

I.

Statement of the Case.

This suit was commenced by the appellant in the Court of Claims by a petition (page 1) filed March 21, 1887, to recover the sum of nine thousand four hundred and sixty-eight dollars and eighteen cents, ($9,468.18,) being balance of pay due him as a Representative in the Forty-ninth Congress from the Second District of Rhode Island.

The suit was based upon the following clause of the Constitution of the United States (Section 5, of Article 1):

"Each House shall be the judge of the elections, returns, and qualifications of its own members."

And upon section 35 of the Revised Statutes of the United States, as amended by the act of January 20, 1874, which fixes the salary or compensation of a Representative in Congress at five thousand dollars per annum.

The Court of Claims finds the fact that the House of Representatives of the Congress of the United States had decided that William A. Pirce was not elected a Member of the House of Representatives of the Forty-ninth Congress from the Second Congressional District of Rhode Island.

The Court also found the fact that Charles H. Page was elected to, sworn in, and took his seat as a Representative in the Forty-ninth Congress from the Second District of Rhode Island.

The Court of Claims, in its opinion dismissing the petition, bases that opinion to a great extent upon its own decision in the case of Shelly *vs.* The United States, reported in 19 Court of Claims, p. 653, and also upon the meaning of the word "predecessor" as used in section 51 of the Revised Statutes of the United States.

From the judgment of dismissal the claimant appealed to this Court.

II.

Assignment of Errors.

The appellant hereby assigns the following errors in the rulings and judgment of the Court of Claims:

1. Error in basing its opinion on the fact that William A. Pirce was a Member of the House of Representatives of the Forty-ninth Congress from the Second District of Rhode Island, because he had received from the Governor of that State a certificate that he had been elected a member from said State and District to the Forty-ninth Congress.

2. Error in citing the case of Shelly as an analagous case.

3. Error in holding that the word "predecessor," as used in the 51st section of the Revised Statutes of the United States, "must be held to mean predecessor in payment."

4. Error in rendering final judgment against the claimant upon the findings of fact made by said Court, whereas upon the findings made the judgment should have been in favor of the claimant.

III.

BRIEF.

Section 5 of Article 1 of the Constitution of the United States provides that "each House shall be the judge of the elections, returns, and qualifications of its own members."

Section 35 of the Revised Statutes of the United States, as amended by the act of 20th January, 1874, fixes the pay of Representatives in Congress at five thousand dollars per annum.

Neither the Governor of Rhode Island, nor the Governor of any other State, has the power to make a Member of the House of Representative in the Congress of the United States by the issuance of his certificate that a certain named person, William A. Pirce, for instance, had been elected a member of that body. An election don't make a member. The returns don't make a member, and though the qualifications are certified to by the Governor, still the person holding such certificate is not a member until the House of Representatives gives title to membership.

A title to membership in the House of Representatives of the United States Congress is only obtained by virtue of the clause in the 5th Section of the 1st Article of the Constitution, which says:

"Each House shall be the judge of the elections, returns, and qualifications of its own members."

The certificate of the Governor of Rhode Island, on which the Court based the title of William A. Pirce to membership in the House of Representatives of the 49th Congress from the second district of Rhode Island, only justified the clerk of the House of Representatives in placing the name of William A. Pirce on the roll of Representatives-elect to the 49th Congress for the second district of Rhode Island, under the provisions of Section 31 of the Revised Statutes, which says:

"Before the first meeting of each Congress the clerk of the next preceding House of Representatives shall make a roll of the Representatives-elect and place thereon the names of those persons, and of such persons only, whose credentials show that they were regularly elected in accordance with the laws of their States, respectively, or the laws of the United States."

That section does not give the Governor of any State the authority to judge of the constitutional right of any one to be a member of the House of Representatives, though they were regularly elected in accordance with the laws of their States, respectively, or the laws of the United States. The House, under the Constitution, is to be the judge of the elections, returns, and qualifications of its own members. The Governor's certificate is only good as to a representative-elect, who, by virtue of such a certificate, is entitled to have his name placed on the clerk's roll of representatives-elect until such time as the House may judge of the election, returns, and qualifications of the person holding such certificate.

The House of Representatives, acting under the authority given it by the clause of the Constitution of the United States before mentioned, declared that William A. Pirce *was not elected* a member of the House of Representatives of the Forty-ninth Congress for the Second Congressional District of Rhode Island. Its declaration is as follows:

"*Resolved*, That William A. Pirce was not elected a member of the House of Representatives of the Forty-ninth Congress from the Second Congressional District of Rhode Island, and that the seat be declared vacant."

The House of Representatives of the Forty-ninth Congress knew its rights under the Constitution and asserted them, the certificate of the Governor of Rhode Island to the contrary notwithstanding. *William A. Pirce was never a member of the Forty-ninth Congress.*

Section 51 of the Revised Statutes of the United States is as follows:

"Whenever a vacancy occurs in either House of Congress, by death or otherwise, of *any member* or delegate *elected* or appointed thereto after the commencement of the Congress to which he has *been elected* or appointed, the person *elected* or appointed to fill it shall be compensated and paid from the time the compensation of his predecessor ceased."

If the section above quoted means anything, it means that a "predecessor" *to a member* must have been *a member*, and to be *a member* within the meaning of the law he must have "*been elected*." The word "*elected*" is used three times, and it would be difficult to express the intention of the law-makers more clearly than it is given in this section.

The resolution adopted by the House of Representatives on the 25th day of January, 1887, in reference to the contested election case of Page *vs.* Pirce, was as follows:

"*Resolved*, That William A. Pirce was not elected a member of the House of Representatives from the Second Congressional District of Rhode Island, and that the seat be declared vacant."

Thus, the House of Representatives being the sole judge, by its solemn resolution declared that no person had been elected to represent the Second District of Rhode Island in the Forty-ninth Congress, and that the seat was vacant. Now, if there had been no election and the seat was vacant, the vacancy must have existed from the very commencement of the Congress, and as it appears from the certificate of the Governor of Rhode Island, under which Charles H. Page was duly sworn in as a member of the Forty-ninth Congress from the Second District of Rhode Island, that he was "regularly elected a Representative from said State in the Forty-ninth Congress of the United States, in accordance with the laws of said State, to fill the vacancy caused by the action of the National House of

Representatives in declaring the seat of William A. Pirce vacant," it must follow that Charles H. Page was elected to the Forty-ninth Congress and not to any fractional part thereof.

The vacancy which Charles H. Page was elected to fill in the Forty-ninth Congress did not occur from any cause referred to in Section 51 of the Revised Statutes, because no one had been elected or appointed to represent the Second Congressional District of Rhode Island in that Congress prior to the election of Charles H. Page.

The case of Shelley is an analagous case in one point only: both Page and Shelley were elected members of Congress near the close of the Congress to which they were elected. That is the whole of the analogy of the cases.

Shelley's name was placed on the Clerk's roll of Representatives-elect. His right to membership was contested by Smith. When the House judged of the election the judgment was in favor of Smith, who had died a few months before the judgment was given. The seat was declared vacant, Shelley was again a candidate, and was admitted as a member. He was paid as a member from the day the seat was declared vacant, having previously drawn pay up to that day by reason of his name being on the Clerk's roll of Representatives-elect. He brought suit in the Court of Claims for pay up to the time of Smith's death, after having already been paid for the same period as one having his name on the roll of Representatives-elect. Shelley was a contestee and Page was a contestant. Shelley had drawn full pay for the Congress, and wanted to be paid twice for the same period. Page has never been paid what he is entitled to as a member of the Forty-ninth Congress. Surely there is not analogy enough in the cases of Shelley and Page to justify the citation of Shelley's case as a legal precedent for Page's case.

By the 20th section of the Revised Statutes Rhode Island was and is entitled to two Members of the House

of Representatives in the Congress of the United States. At the regular election for members of Congress in the State of Rhode Island on the 4th day of November, 1884, a member was regularly elected for the First District, and there was a failure to elect a member from the Second District of that State, and a vacancy in the representation from the District and State was declared by the House of Representatives.

The 26th section of the Revised Statutes provides:

"That the time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories, respectively."

In accordance with that section the Governor of Rhode Island ordered an election to fill the vacancy occasioned by the failure to elect at the regular election in November, 1884, a member to represent the Second Congressional District of the State. At that election Charles H. Page was elected and admitted to the seat in the House of Representatives to which the member would have been entitled if there had not been a failure to elect at the regular election in November, 1884. When admitted to the seat by the House of Representatives he became entitled to all the rights, benefits, privileges, and compensation that he would have been entitled to if he had been elected at the regular election in November, 1884.

Rhode Island was entitled to two Members of the House of Representatives in the Forty-ninth Congress, and it mattered not on what day of the Congress they were elected, provided there had been a failure to elect at the regular election. It might have been on the last day as well as on the first. The compensation would have been the same.

William A. Pirce was compensated only as a member whose name was on the Clerk's roll of Representatives-elect. Section 38 of the Revised Statutes provides that—

"Representatives and Delegates elect to Congress, whose credentials in due form of law have been duly filed with the Clerk of the House of Representatives in accordance with the provisions of section 3, may receive their compensation monthly from the beginning of their term until the beginning of the first session of each Congress upon a certificate in the form now in use, to be signed by the Clerk of the House, which shall have the like force and effect as is given to the certificate of the Speaker."

The Revised Statutes provide that members of Congress shall be paid a salary of five thousand dollars per annum. There are no restrictions as to *the time* when the member shall be elected, provided he is elected in accordance with law, to entitle him to the per annum salary. He may be elected before the Congress begins, or at any time during the Congress, if he is the only member elected for a given district to that Congress.

The uniform practice has been, that members who were elected after the beginning of Congress were paid from the beginning of the Congress to which they were elected. Even in the 50th Congress the Hon. Charles J. Faulkner, of West Virginia, who was not elected to the Senate until after the beginning of the Congress, and was not admitted until the middle of the following December, was paid from the 4th of March, 1887, the day of the beginning of the Congress, his seat having been contested.

I respectfully submit, in conclusion, that the judgment of the Court of Claims should be reversed, and the cause remanded, with directions to enter judgment in favor of the claimant for the sum of nine thousand four hundred and sixty-eight dollars and eighteen cents ($9,468.18.)

Respectfully submitted.

ALLAN RUTHERFORD,
Attorney and Counsel for Appellant.

Synopsis of Brief.

Nowhere in the Constitution, or the laws, is there a reference to a *sitting member*. No authority is given by the Constitution, or the laws, to fix the compensation of members by reference to *sitting members*.

What constitutes a member is defined by the Constitution to be one whose election, returns, and qualifications have been judged of by the House of Representatives, and who has been admitted to membership after such judgment.

Section 51 of the Revised Statutes only apportions the annual salary appropriated for a member of the House of Representatives among two, or more, members in the event of a vacancy by reason of death, or otherwise, of a member elected thereto after the commencement of the Congress to which he has been elected, and to authorize the last-elected member to draw the accrued salary between the time of his election and the time when the vacancy was created by death or otherwise. And it is in such a case, and such a case only, that the word "predecessor" can be used in fixing the compensation of a member.

In the case of a vacancy by reason of a failure to elect, at the regular election preceding the meeting of a Congress, there is no provision in the Constitution, or the laws, to withhold any part of the annual salary of the member who is elected at a subsequent election and admitted as a member of the House of Representatives. The word "predecessor" can have no bearing whatever on such a vacancy. Not a word or a line in section 51 refers to such a vacancy. If it had been intended to refer to such a vacancy it would have been easy to add the words "or failure to elect." There is no ambiguity about section 51 of the Revised Statutes.

Section six, Article one, of the Constitution, says:

"The Senators and Representatives shall receive a compensation for their services to be ascertained by law."

Section 35 of the Revised Statutes, as amended by the act of January 20, 1874, says that—

"Each Senator, Representative, and Delegate is entitled to a salary (except as to the Speaker) of five thousand dollars a year."

Section 51 qualifies that section in the manner above referred to. That is all the law there is on the subject.

Respectfully submitted.

ALLAN RUTHERFORD,
Attorney and Counsel for Appellant.

127-67

127-67

Office Supreme Court U. S.
FILED
MAR 20 1888
JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1887.

CHARLES H. PAGE, APPELLANT,
vs.
THE UNITED STATES. } No. 1387.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

"The Senators and Representatives shall receive a compensation for their services to be ascertained by law."

Section 35 of the Revised Statutes, as amended by the act of January 20, 1874, says that—

"Each Senator, Representative, and Delegate is entitled to a salary (except as to the Speaker) of five thousand dollars a year."

Section 51 qualifies that section in the manner above referred to. That is all the law there is on the subject.

Respectfully submitted.

ALLAN RUTHERFORD,
Attorney and Counsel for Appellant.

127-67

127-67

Office Supreme Court U. S.
FILED
MAR 29 1888
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1887.

CHARLES H. PAGE, APPELLANT,
vs.
THE UNITED STATES. } No. 1387.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

CHARLES H. PAGE, APPELLANT,
vs.
THE UNITED STATES. } No. 1387.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

The material facts in this case are embraced in the findings. (Rec., 2, 3, 4.) The main question presented is, whether such facts make out a claim upon which Mr. Page can recover when considered in connection with a proper interpretation of section 51 of the Revised Statutes. And it may be further stated that the rights of the parties hereto depend largely, if not altogether, upon the meaning given by the court to the word "predecessor" as used in said section.

Pirce's credentials entitled him to recognition, and made it the duty of the Clerk of the House of Representatives to place his name on the roll of Representatives-elect, and, upon taking and subscribing the proper oath, he was

entitled to receive his salary at the end of each month. (Rev. Stats., §§ 26, 31, 38, 39, 46, 47, 48; Act of March 3, 1875, 18 Stat. L., 389.)

Mr. Pirce, having been by reason of his credentials placed upon the pay-roll, sworn into office, and recognized by the House of Representatives under the Revised Statutes, became the sitting member of the Forty-ninth Congress from the Second Congressional district of Rhode Island, and could only be ousted and deprived of his vested rights, which had been acknowledged up to this point, by the exercise of the power granted to the House of Representatives by the provisions of the Constitution, which authorizes it "to be the judge of the elections, returns, and qualifications of its own members."

The right of Mr. Pirce to hold the office was contested by the claimant. Upon an investigation into the merits of the case, the Committee on Elections found that Pirce had not been elected, and had no title to the seat he occupied. Thereupon the committee reported to the House the resolution which was agreed to January 25, 1887, and which reads as follows:

> *Resolved*, That a William A. Pirce was not elected a member of the House of Representatives of the Forty-ninth Congress from the Second Congressional district of Rhode Island, and that the seat be declared vacant.

The seat in the House of Representatives for the Second Congressional district of Rhode Island in the Forty-ninth Congress became vacant on the 26th day of January, 1887, and remained so until the vacancy was filled by a new elec-

tion, and there was no sitting member from that date until Mr. Page was sworn in on February 25, 1887.

The effect of the resolution is easily comprehended. Mr. Pirce had, by reason of his credentials in due form, a color of right as a Representative in the Forty-ninth Congress to a seat, and the compensation prescribed by law, until such period of the term of office as the House of Representatives should declare him not entitled to the seat. (*Shelley's Case*, 3 Law., 321.) Such declaration was made by the above resolution, which became effective on the day of its passage, unseated Mr. Pirce and stopped his compensation. Thus a vacancy occurred, and there was no sitting member, either *de jure* or *de facto*, until Mr. Page, the claimant, was subsequently elected and seated.

The claimant was elected to fill the vacancy February 21, 1887, and sworn in February 25, 1887. He was recognized as the sitting member on the latter date and received compensation from January 26, 1887, the date the vacancy was caused by the passage of the resolution.

The resolution unseating Pirce does not seat Page, but declares the former was not elected. For this reason it is argued Pirce, although he was the sitting member, as shown by the facts, was not the "predecessor" of the claimant, but that the former member of Congress from the Second Congressional district of Rhode Island, whose term of office expired with the Forty-eighth Congress, was such "predecessor." This brings us to the consideration of the section of the Revised Statutes regulating this question. It reads as follows:

> SEC. 51. Whenever a vacancy occurs in either House of Congress, by death or otherwise, of any

> member or delegate elected or appointed thereto after the commencement of the Congress to which he has been elected or appointed, the person elected or appointed to fill it shall be compensated and paid from the time that the *compensation of his predecessor ceased.*

Who was Page's "predecessor" under the proper interpretation of the above section? The determination of this question settles the claimant's right to recover in this action. If Pirce was his predecessor he has been paid in full. The defendants contend that Pirce was such predecessor. The purview of the section is simply to regulate the compensation of members of Congress in regard to vacancies.

Pirce having received the credentials from the proper officer of his State, was prima facie entitled to the office until the House of Representatives determined otherwise. Congress has wisely provided who shall fill the office and receive the compensation pending the investigation of a contest upon the merits, and in this instance it was Pirce, because he held the credentials in due form.

If persons holding credentials in due form could not be inducted into office, the objects of representation would in many instances, and could in all, be absolutely defeated and the people's interests would suffer. (McCrary's Law of Elections, § 204.)

> Where the statute gives the governor of a State the power, and makes it his duty to commission the person elected to an office, the issuing of a commission by him *confers a vested right upon the person commissioned,* which nothing but a judicial decision can take away. (*Ib.*, § 209.)

> But a commission given by the governor, or other competent authority, does not oust the jurisdiction of the proper tribunal in a contested-election case. *It is simply evidence of the right to hold the office; gives color to the acts of the incumbent and constitutes him an officer de facto.* The election being set aside, or the person holding the commission being *held not elected* by a tribunal of competent jurisdiction, the commission falls to the ground. *The person duly commissioned must exercise the function of the office until, upon an investigation upon the merits, it is judicially determined otherwise.* (*Ib.*, § 210.)

It will be observed from the law quoted above (1) that the credentials conferred a vested right upon Pirce; (2) that it was evidence of his right to hold the office; (3) that it gave color to his acts while a sitting member of Congress; (4) that it constituted him an officer *de facto;* and (5) that it was his duty as the holder of such credentials to exercise the functions of the office until upon an investigation upon the merits it was judicially determined otherwise.

The facts show that he discharged all the duties required of him by law, until he was, upon an investigation upon the merits, declared not elected. (Rec., 2, 3, 4.) What more could have been done to make him the predecessor of the claimant? Webster defines the word predecessor to mean "one who precedes; a person who has preceded another in any State, position, office, or the like; one whom another follows or comes after."

The following quotations are made from Judge Lawrence's opinion in Shelley's Case (*supra*), which are applicable here:

> A vacancy occurs also when the House of Repre-

sentatives decides a contest and declares a sitting member not entitled to a seat, unless some other (living) person is at the same time declared entitled to it (p. 325).

The resolution declared that Shelley was not elected * * * and is not entitled to retain the seat which he now (at that date) occupies. This made the vacancy.

As a general rule, *de facto* officers are not entitled to payment from the United States of the compensation prescribed by statute. * * * But it is competent for Congress to provide by statute for payment to a Representative having the proper credentials until his right to a seat is ultimately determined, although he is subsequently declared not duly elected, and this is precisely what Congress has done.

And this "predecessor" must be * * either (1) *de jure* or (2) *de facto*.

A predecessor is one who obtained a seat, not one who merely had a right to obtain it.

In the case at bar Pirce had a right to the seat in Congress by reason of his credentials in due form, and actually obtained and occupied such seat. He also received the compensation up to the time he was unseated. (Rec. 4.) He was, therefore, in any view that may be taken of the case, the immediate and only predecessor of the claimant. Pirce was unquestionably the predecessor of the claimant in the matter of the salary of the place.

The defendants could with safety and propriety rest all the questions involved in this case upon the ruling of the Court of Claims made in Shelley's Case, in June, 1884. (19 C. Cls. R., 653.)

The court decided in that case that—

The Revised Statutes, § 51, provides that a per-

son elected to fill a vacancy in Congress shall be *paid from the time that the compensation of his predecessor ceased.* The term "*predecessor*" here must be restricted to him who was predecessor, not in the abstract right by virtue of a legal election, *but predecessor in the matter of the salary of the place.*

If, then, we can find from the statute *who is the person entitled to be paid pending the contest for the seat,* we shall know *who is the predecessor within the true intent of the statute.*

The answer to this question has been already given. The statute provides for the payment of the *sitting member.* (*Ib.*, 657.)

It is not necessary to discuss this point further. Inasmuch as Pirce was the sitting member, as shown by the facts, he was Page's predecessor in the matter of the salary, as well as for all other purposes.

Page's credentials also show that he was elected "to fill the vacancy caused by the action of the National House of Representatives in declaring the seat of William A. Pirce vacant." Rec. 4.)

The argument of counsel for claimant is fallacious when considered in connection with the plain meaning of the language used in section 51 of the Revised Statutes. We quote from claimant's brief presented to the court below, as follows:

Thus, the House of Representatives, being the sole judge, by its solemn resolution declared that no person had been elected to represent the Second District of Rhode Island in the 49th Congress, and that the seat was vacant. Now, if there had been no election, and the seat was vacant, the vacancy must have existed from the very commencement of the Congress,

> and as it appears from the certificate of the Governor of Rhode Island, under which Charles H. Page was duly sworn in as a member of the 49th Congress from the Second District of Rhode Island, that he was "regularly elected a Representative from said State in the 49th Congress of the United States, in accordance with the laws of said State, to fill the vacancy caused by the action of the National House of Representatives in declaring the seat of William A. Pirce vacant," it must follow that Charles H. Page was elected to the *whole* of the 49th Congress, and not to any fractional part thereof.
>
> * * * * * * *
>
> The "predecessor" of Charles H. Page in Congress from the 2d District of Rhode Island was Nathan F. Dixon, who filled the seat in the 48th Congress at the time said Congress expired by operation of law.

We take the position that Dixon could not have been the predecessor of Page under the provisions of section 51 of the Revised Statutes. No such predecessor could have existed unless he had been a sitting member of the Forty-ninth Congress, and entitled to receive compensation under the statutes. A careful reading of section 51 will sustain this position. Read it in this way:

> Whenever a *vacancy occurs* in either House of Congress, *by death or otherwise*, of any member or delegate elected or appointed thereto, AFTER THE COMMENCEMENT OF THE CONGRESS to which he has been elected or appinted, the person elected or appointed *to fill it* shall be compensated and paid from the time that the *compensation of his predecessor ceased.*

Dixon could not have been the predecessor of Page under such statute, because he was elected to the Forty-

eighth, and not to the Forty-ninth, Congress. He could not, therefore, have created a vacancy in the Forty-ninth Congress *after its commencement*, for the reason that he was not a member of that body. A vacancy could only have been made to exist in the Forty-ninth Congress "by death or otherwise" of some member thereof, *after the commencement of such Congress*. The predecessor of Mr. Page must be found as a sitting member of the Forty-ninth Congress, or he has none. The facts show Pirce to have been such sitting member, either *de jure* or *de facto*, under the statutes; that he received the compensation belonging to the office; that upon an investigation he was declared not elected, and the seat declared vacant; that subsequently the claimant was, according to the terms of his credentials, elected to the vacant seat of William A. Pirce in the Forty-ninth Congress.

It is insisted by counsel for appellant that sections 49 and 51, Revised Statutes, should be construed together. By tracing these sections back to their enactment, it will be seen that they were enacted at different times, and for distinct purposes.

The claimant has been paid in full from the time the compensation of his predecessor (Mr. Pirce) ceased, and the judgment should be affirmed.

A. H. GARLAND,
Attorney-General.
HEBER J. MAY,
Assistant Attorney.

17646——2

○